No. 87-1383

In the Supreme Court of the United States

OCTOBER TERM, 1988

UNITED STATES OF AMERICA, APPELLANT

v.

IRWIN HALPER

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

REPLY BRIEF FOR THE UNITED STATES

CHARLES FRIED
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

TABLE OF AUTHORITIES

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As the Court, speaking through Justice Brandeis, wrote 50 years ago, "Congress may impose both a criminal and a civil sanction in regard to the same act or omission * * *." *Helvering* v. *Mitchell*, 303 U.S. 391, 399 (1938). Whenever the defendant in an ostensibly civil action seeks to set up his prior criminal prosecution as a bar to the proceeding, "[t]he question for decision is thus whether [the statute applied in the second action] imposes a criminal sanction" (*ibid.*). That question, which "is one of statutory construction" (*ibid.*), is the issue we addressed in our opening brief, just as it is the issue that the district court resolved in favor of appellee (see J.S. App. 5a ("the $130,000 penalty sought in this case amounts to a criminal penalty")).[1] Nevertheless, the amicus curiae invited by this Court to brief and

[1] Cf. Amicus Br. 14 (claiming that "[t]he ruling below was much narrower than the straw man the government attacks").

argue this case in support of the judgment below insists (Br. 7) that "[t]he government * * * asks the wrong question," and that the real question is *not* whether the statute requiring the monetary judgment sought against appellee imposes a criminal sanction. According to amicus, the Court should affirm the judgment below if it determines that the relief sought by the government under the False Claims Act in this case was "punishment," whether or not that recovery was civil in nature (*ibid.*).

Amicus's position cannot be squared with numerous decisions of this Court and should be rejected once again. Contrary to amicus's position, if the Court determines that the proceeding for civil penalties against appellee was civil rather than criminal in nature, then the Double Jeopardy Clause has no role to play in this case. And, as our opening brief demonstrated, that proceeding was indeed civil.

1. The basic principle established in *Helvering* v. *Mitchell, supra*—that only "criminal" penalties give rise to double jeopardy problems—has been reaffirmed by this Court many times. See *United States* v. *One Assortment of 89 Firearms*, 465 U.S. 354, 359-360, 365 (1984) (quoting *Helvering* v. *Mitchell, supra*); 465 U.S. at 360 (double jeopardy "inapposite" when remedy is "a civil, not a criminal, sanction"); *id.* at 362 ("Unless the forfeiture sanction was intended as punishment, *so that the proceeding is essentially criminal in character*, the Double Jeopardy Clause is not applicable.") (emphasis added); *United States* v. *Ward*, 448 U.S. 242, 248 (1980) ("The distinction between a civil penalty and a criminal penalty is of some constitutional import. * * * See, *e. g.*, *Helvering* v. *Mitchell*, 303 U.S. 391, 399 (1938) (Double Jeopardy Clause protects only against two criminal punishments) * * *."); *Breed* v. *Jones*, 421 U.S. 519, 528 (1975) ("[W]e have held that the risk to which the [Double Jeopardy] Clause refers is not present in proceedings that are not 'essentially

criminal.' ") (quoting *Helvering* v. *Mitchell, supra*); *United States* v. *Wilson*, 420 U.S. 332, 344 n.13 (1975) ("On a number of occasions, the Court has observed that the Double Jeopardy Clause 'prohibits merely punishing twice, or attempting a second time to punish criminally, for the same offense.' ") (quoting *Helvering* v. *Mitchell, supra*); *One Lot Emerald Cut Stones* v. *United States*, 409 U.S. 232, 235-236 (1972) (quoting *Helvering* v. *Mitchell, supra*); *Rex Trailer Co.* v. *United States*, 350 U.S. 148, 150-151 (1956) (quoting *Helvering* v. *Mitchell, supra*); *United States ex rel. Marcus* v. *Hess*, 317 U.S. 537, 549 (1943) (quoting *Helvering* v. *Mitchell, supra*).[2]

As these cases amply demonstrate, *Helvering* v. *Mitchell* cannot be distinguished, as amicus suggests (Br. 11-13), on the ground that the defendant in that case had been *acquitted* in the criminal prosecution. Indeed, prior *convictions* followed by civil actions for penalties are precisely what gave rise to the cases on which we principally relied in our opening brief.

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[2] See also 18 C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 4474, at 749 (1981) ("Problems arise only when it is asserted that a nominally civil action brought by the government involves an element of punishment that runs afoul of double jeopardy principles. Although no clear principle has emerged for distinguishing remedial from punitive actions, most decisions have permitted criminal prosecutions to be followed by civil actions for injunction, forfeiture, monetary penalties, or double damages.") (footnote omitted); 1B J. Moore, J. Lucas & T. Currier, *Moore's Federal Practice* ¶ 0.418[2], at 564 (2d ed. 1988) ("The protection against double jeopardy is afforded only to a defendant in a criminal case."); *id.* ¶ 0.418[3], at 585-586 (discussing *Helvering* v. *Mitchell, supra*); *id.* ¶ 0.418[3], at 590-592 (discussing *One Lot Emerald Cut Stones* v. *United States, supra*); J. Sigler, *Double Jeopardy* 60 & n.93 (1969) (discussing cases supporting the criminal/civil distinction and criticizing early cases that suggest a different view).

Thus, in *Rex Trailer Co.* v. *United States, supra,* the defendant had been convicted, not acquitted, of fraud, and the issue before the Court was whether the Double Jeopardy Clause permitted the assessment of civil penalties in a later proceeding. To answer that question, the Court looked to the *Helvering* v. *Mitchell* test (350 U.S. at 150-151), not to some other test that supposedly governs when the multiple-punishment aspect of the Double Jeopardy Clause is at issue. The Court concluded its opinion by observing that "[o]n this record it cannot be said that the measure of recovery fixed by Congress in the Act is so unreasonable or excessive that it transformed what was clearly intended as a civil remedy *into a criminal penalty*" (350 U.S. at 154 (emphasis added)). If amicus's position were the law, the Court's concluding sentence would have been pointless, for only the status of the civil penalties as "punishment" vel non, not their status as "criminal" or "civil" penalties, would matter.

Likewise, in *United States ex rel. Marcus* v. *Hess, supra,* the defendant had been convicted, not acquitted, under a general statute dealing with conspiracy to defraud the government,[3] and the Double Jeopardy Clause was put at issue in precisely the same way that it is here. The Court relied on the analysis of *Helvering* v. *Mitchell,* (317 U.S. at 548), framed the issue as whether the action before it was "criminal or remedial" (*id.* at 549), and based its judgment on the proposition that the action "d[id] not lose the quality of a civil action" simply because more than actual

[3] Our opening brief was in error in stating (at 11) that the conviction was under the criminal false claims statute. However, the distinction between a prior conviction under that statute and a prior conviction under the general fraud statute played no role in the Court's analysis. There is thus no basis for amicus's remarks that our misstatement reflects "a rather significant point" (Br. 15 n.10).

damages were recovered (*id.* at 550). Most devastating to amicus's position, the Court noted that " 'Punishment, in a certain and very limited sense, may be the result of the statute before us so far as the wrong-doer is concerned,' but this is not enough to label it a criminal statute" (*ibid.* (citation omitted)). Every one of those statements would have been beside the point if, as amicus contends, the distinction between "criminal" and "civil" remedies is irrelevant in a multiple-punishment case.

Indeed, amicus's proposition leads to the astounding conclusion (Br. 35) that a defendant who is convicted in a criminal case, but receives a suspended sentence or a fine smaller than his prospective civil penalties, is better off than a defendant who is acquitted of criminal charges, for the former but not the latter would be able to claim the protection of double jeopardy in a subsequent civil action for "punitive" damages. The more sensible interpretation of the Clause—and the one more consistent with this Court's cases—is that *both* a convicted and an acquitted defendant can invoke the Clause to protect against subsequent criminal punishment for the same offense, but that *neither* can complain that a subsequent proceeding for civil penalties places him in "jeopardy" in the constitutional sense.

Asserted against this overwhelming weight of authority is amicus's reading of *United States* v. *La Franca,* 282 U.S. 568 (1931). *La Franca,* however, does not and cannot stand for the broad proposition—contrary to numerous later decisions—that any "punishment," whether civil or criminal, is barred by the Double Jeopardy Clause when the defendant has already been criminally convicted for the conduct that gives rise to the second proceeding. As amicus recognizes (Br. 10-11 & n.7), the Double Jeopardy Clause was addressed in *La Franca* only to the limited ex-

tent of suggesting that it would create constitutional *doubts* if the statute at issue in that case were construed to permit the imposition of civil penalties following a criminal conviction. The case was then resolved exclusively as a matter of statutory interpretation: the Court construed the word "prosecution" in 27 U.S.C. (1926 ed.) 3 to include a civil action to recover penalties for an act declared to be a crime (282 U.S. at 574-575). *La Franca* therefore resolved no constitutional issues. Furthermore, the constitutional doubts alluded to by the Court were laid to rest just seven years later in *Helvering* v. *Mitchell*, *supra*, and have not been revived since.[6]

Amicus's attempt to resurrect the proposition that the Double Jeopardy Clause applies to civil penalties that are not in fact "criminal" is not only contrary to precedent, but is also irreconcilable with the long understanding that parallel criminal and civil actions seeking penalties raise no double jeopardy concerns. It cannot be seriously sug-

[6] Some of the statements in *La Franca*, if taken to draw distinctions of importance for purposes of the Double Jeopardy Clause, certainly do not survive this Court's more recent decisions. Compare, *e.g.*, *La Franca*, 282 U.S. at 573 ("The term 'penalty' involves the idea of punishment, and its character is not changed by the mode in which it is inflicted, whether by a civil action or a criminal prosecution."), with *One Assortment of 89 Firearms*, 465 U.S. at 364 n.6 ("Mulcahey • • • argu[es] that inclusion of the forfeiture provision in th[e] section [labeled 'Penalties'] demonstrates Congress' intention to create an additional criminal sanction. This argument is unavailing; both criminal and civil sanctions may be labeled 'penalties.' "), and *Hess*, 317 U.S. at 551. Indeed, as early as 1943, in *Hess*, 317 U.S. at 554 (concurring opinion), Justice Frankfurter observed the need to "explain[ ] away uncritical language in [three specified] earlier cases," among them *La Franca*. The other two cases that Justice Frankfurter criticized were *United States* v. *Chouteau*, 102 U.S. 603 (1881), which amicus cites (Br. 7, 11) for essentially the same proposition as *La Franca*, and *Coffey* v. *United States*, 116 U.S. 436 (1886), which this Court has since expressly overruled in *United States* v. *One Assortment of 89 Firearms*, *supra*.

gested, for example, that a treble-damages action under 15 U.S.C. 15 following a defendant's conviction for price fixing is constitutionally impermissible unless it is somehow established that the extra twofold damages do not constitute "punishment." Similarly, it cannot be maintained that, under the aegis of the Double Jeopardy Clause, a defendant successfully prosecuted for manufacturing a product that kills innocent people would thereafter escape, in a civil tort action, all punitive damages (which surely include an element of "punishment").

More fundamentally, amicus never explains why it makes sense to analyze this case under the "multiple punishment" aspect of double jeopardy rather than the "multiple prosecution" aspect. This Court's decisions establish that the double jeopardy protection against multiple punishment is essentially a protection against punishment that the legislature has not authorized. "[T]he question of what punishments are constitutionally permissible is not different from the question of what punishments the Legislative Branch intended to be imposed." *Albernaz* v. *United States*, 450 U.S. 333, 344 (1981); *Missouri* v. *Hunter*, 459 U.S. 359, 366 (1983); *Garrett* v. *United States*, 471 U.S. 773, 793 (1985). Congress plainly authorized cumulative criminal and civil remedies under the False Claims Act.[5] Thus, the prohibition of multiple

[5] In the original False Claims Act, Congress underscored its intent to make civil and criminal remedies cumulatively available by providing that a person "who shall do or commit any of the [prohibited acts] • • • shall forfeit and pay to the United States the sum of two thousand dollars, and, in addition, double the amount of damages which the United States may have sustained • • • and every such person shall *in addition thereto*, on conviction in any court of competent jurisdiction, be punished by imprisonment • • • or by fine" (Act of Mar. 2, 1863, ch. 67, § 3, 12 Stat. 698 (emphasis added)). The 1986 revisions of the Act likewise expressly contemplate that a civil action

punishment would not have barred the government from seeking those remedies in a single proceeding, as amicus appears to concede (Br. 8, 23 n.16, 34). It therefore is not helpful to view the issue in this case as one of unconstitutional "multiple punishment," since appellee is not being "punished" any more than Congress authorized, whether the government achieves its remedies in one proceeding or two.

The only colorable double jeopardy claim here flows from appellee's desire to be free of a second proceeding, after his criminal conviction has become final, in which the government seeks to recover the civil aspect of the False Claims Act remedy. The Double Jeopardy Clause does protect some finality interests of criminal defendants, but the Court has made it abundantly plain that the protection is available only when the second proceeding seeks to impose "criminal" penalties. See the cases cited at 2-3, *supra*; cf. Westen, *The Three Faces of Double Jeopardy: Reflections on Government Appeals of Criminal Sentences*, 78 Mich. L. Rev. 1001, 1026-1033 (1980) (distinguishing the purposes of the double jeopardy protections against multiple punishment and multiple proceedings). While it is plausible to ask whether the Double Jeopardy Clause has a role to play in the division of the False Claims Act remedies into separate criminal and civil proceedings (and to answer that it does not), amicus offers no explanation as to why the policies underlying that Clause require that this case be resolved under a doctrine

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may follow a criminal conviction by providing (31 U.S.C. (Supp. IV) 3731(d)) that a "final judgment rendered in favor of the United States in any criminal proceeding charging fraud or false statements • • • shall estop the defendant from denying the essential elements of the offense in any action which involves the same transaction as in the criminal proceeding and which is brought under subsection (a) or (b) of section 3730" of Title 31.

that asks only whether the two proceedings both involve "punishment." [6]

Amicus is therefore wrong to suggest that the dispositive question in this case is whether the civil penalties the government seeks against appellee are in some sense "punishment." Rather, amicus must shoulder the much heavier burden of showing by "the clearest proof" (*Flemming* v. *Nestor*, 363 U.S. 603, 617 (1960)) that "the statutory scheme [is] so punitive either in purpose or effect as to negate [Congress's] intention" to establish a civil penalty.

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[6] This Court has consistently expressed the values underpinning the Double Jeopardy Clause in terms that reflect the specific risks of criminal proceedings. "The underlying idea," the Court has stated, "is that [the government] with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty." *Green* v. *United States*, 355 U.S. 184, 187-188 (1957).

> As we have observed, the risk to which the term jeopardy refers is that traditionally associated with "actions intended to authorize criminal punishment to vindicate public justice." Because of its purpose and potential consequences, and the nature and resources of the State, such a proceeding imposes heavy pressures and burdens – psychological, physical, and financial – on a person charged. The purpose of the Double Jeopardy Clause is to require that he be subject to that experience only once "for the same offence."

Breed v. *Jones*, 421 U.S. 519, 529-530 (1975) (citations omitted). The Court has not suggested that civil actions pose comparable risks.

United States v. *Ward*, 448 U.S. 242, 248-249 (1980); *United States* v. *One Assortment of 89 Firearms*, 465 U.S. at 362-363 (same).[7]

2. Amicus, who denies (Br. 14) that he even must undertake the effort prescribed by *Ward*, certainly has not succeeded in that effort. In fact, to the extent that he acknowledges the need to show that the statute in this case imposes a "criminal" penalty, amicus nevertheless proposes once again a test that differs considerably from the one mandated by this Court's decisions: amicus focuses solely on whether the penalty is in some sense proportional to the government's loss *in this particular case* rather than on whether the penalty is proportional to the harms that statute was designed to remedy as a general matter. As we showed in our opening brief (at 14-21, 30), it is the latter inquiry that this Court has mandated.

This Court's majority opinions in *Hess* and *Rex Trailer* make clear that a case-by-case assessment of proportionality is inappropriate. Quite the contrary, the *Hess* majority stated that "the device of double damages plus a specific sum was chosen to make sure that the government would be made completely whole," and stressed that "[t]he inherent difficulty of choosing a proper specific sum which would give full restitution was a problem for Con-

[7] That inquiry, and not an artificial "effort to find the one, true purpose behind the sanctions" (Amicus Br. 24), is what controls this case. One of the legitimate civil purposes of penalties under the civil False Claims Act is to deter fraud, just as other civil remedies such as punitive damages and treble damages serve a similar deterrent effect (see U.S. Br. 19-20). This Court, however, could not possibly have spoken more plainly in declaring that such a purpose, by itself, does not convert a civil remedy into a criminal one (see *Hess*, 317 U.S. at 550-551). See also *Tull* v. *United States*, No. 85-1259 (Apr. 28, 1987), slip op. 9-10 (discussing common law history of actions for civil penalties).

gress" (317 U.S. at 551-552). Amicus's suggestion that the courts may impose a ceiling on civil remedies in any particular case equal to what in the court's view would constitute full restitution is thus simply contrary to *Hess*, both with respect to which branch of government should make the decision concerning the appropriate remedy, and with respect to the level of generality at which that decision can permissibly be made.

Unable to find anything in the majority opinion in *Hess* that compels a case-by-case proportionality inquiry in order to determine whether a statute is "civil" or "criminal," amicus relies instead (Br. 17-18) on Justice Frankfurter's concurring opinion in *Hess*. Justice Frankfurter suggested that under the majority's approach the defendants in any given case *should* be "allowed to prove that, as a matter of fact, the forfeiture and the double damages are punitive because they exceed any amount that could reasonably be regarded as the equivalent of compensation for the Government's loss" (317 U.S. at 554). But the majority plainly intended no such thing. Justice Frankfurter's apparent purpose in this portion of his opinion was to take the majority to task for *not* allowing such a factual inquiry, even though Justice Frankfurter regarded such an inquiry as a logical consequence of the majority's approach.[8]

Rex Trailer, decided 13 years after *Hess*, even more clearly refutes the use of a simple proportionality inquiry in determining whether civil sanctions can follow a convic-

[8] Justice Frankfurter would have held (317 U.S. at 555) instead that "where two [separate] proceedings merely carry out the remedies which Congress has prescribed in advance for a wrong, they do not twice put a man in jeopardy for the same offense" – an approach that would readily require reversal in this case.

tion, and, concomitantly, is even less susceptible than *Hess* to the reading that amicus would give it (Amicus Br. 19-21). The government alleged and proved *no* specific damages in *Rex Trailer* (see 350 U.S. at 152-153), and there is thus no reason to believe that the penalty imposed in *Rex Trailer* was any less than 220 times the government's direct loss from the defendant's fraud (cf. Amicus Br. 17 n.11), or eight times the government's total cost of investigation and prosecution (cf. *id.* at 6).[9] Thus, when

[9] The figures we use in text are those that amicus uses to describe the result here, but we note that amicus takes considerable liberties in repeatedly characterizing as a factual finding (Amicus Br. 4, 6, 18, 21, 29) the district court's estimate (J.S. App. 10a) of $16,000 as the amount necessary to compensate the government for its costs of investigation and prosecution. The district court resolved this case on summary judgment (see *id.* at 1a, 6a) and thus was in no position to make factual findings. The district court's $16,000 figure is more accurately characterized as a "guesstimate" than as a factual finding; indeed, the court itself acknowledged that its figure "is at best an approximation of the amount required to make the Government whole, [since] the Government, in keeping with the relief it seeks, has submitted no evidence of its expenses in this action" (*id.* at 11a). Though amicus believes (Br. 29) that the government could easily "adduce evidence" of its expenses in prosecuting appellee, there is no ready way for the government to account for the myriad types of costs it incurs in the investigation and prosecution of frauds, or to allocate such costs to a particular case. The rule proposed by amicus would thus thwart any real opportunity for the government to recoup the manifold costs it incurs in its effort to root out fraud. Cf. *Rex Trailer,* 350 U.S. at 153 (a lump sum functions to provide recovery when damages "may be difficult or impossible to ascertain"). In any event, amicus's desire to elevate the district court's estimate into a factual finding that the government suffered a loss of $16,000 is ultimately perplexing, for it suggests that the government's $130,000 recovery under the False Claims Act would be only "eight times any reasonable notion of its total loss" (Amicus Br. 7), not the "*220 times* actual damages" that amicus elsewhere claims (*id.* at 17 n.11 (emphasis in original)).

the *Rex Trailer* Court suggested that "liquidated damages" prescribed by statute must be "reasonable" (350 U.S. at 151) in order not to be deemed criminal in nature, it could not possibly have meant that the reasonableness inquiry must be conducted by dividing the liquidated damages by the actual loss and deciding whether that number was too large. Similarly, the paragraph in which the Court concluded that the liquidated damages were not unreasonable "[o]n this record" (*id.* at 154) contains no discussion of the *amount* of the government's injury, focusing only on the *fact* of injury (see *id.* at 153). Here, it is undeniably true that every one of appellee's 65 frauds injured the government, and *Rex Trailer* therefore cannot be distinguished from this case.

There is another reason why amicus's suggested case-by-case approach is misguided. The protection against double jeopardy becomes relevant only when the punishment facing the defendant is essentially *criminal.* That determination can sensibly be made only by looking at specific statutory remedies and procedures, and by assessing them in light of the interests Congress sought to advance. If a statute is intended to be civil and there is no showing that "the *measure of recovery* fixed by Congress in the Act is so unreasonable or excessive that it transformed what was clearly intended as a civil remedy into a criminal penalty" (*Rex Trailer,* 350 U.S. at 154 (emphasis added)), an action under that statute does not raise double jeopardy concerns simply because the measure of recovery is asserted to work "punishment" in one case. The line that the Constitution draws between civil and criminal proceedings, in the Double Jeopardy Clause as elsewhere, reflects an assessment of the different kinds of risks that are present in each type of proceeding (see note 6, *supra*). The imposition of criminal penalties represents the moral condemnation of the community and carries with it various collateral conse-

quences that are generally absent from civil proceedings, even when those proceedings seek to impose a deterrent remedy or "punitive" damages. Viewed on a case-by-case basis, many "civil" proceedings brought after criminal convictions, such as debarment from government contracting or the loss of a professional license, may be viewed as imposing disproportionately harsh remedies, or "punishment," compared with the actual harm inflicted by the individual. But such proceedings have never been held to raise double jeopardy problems. Despite their significance to the persons involved, those kinds of proceedings, judged in light of the statutes that authorize them, simply do not carry the kind of criminal overtones that bring the Double Jeopardy Clause into play.[10]

Likewise, the proceeding against appellee here was brought under the civil False Claims Act, which this Court has long understood to have remedial, not criminal, objectives. *United States* v. *Bornstein*, 423 U.S. 303, 314 (1976) (noting compensatory objective of the civil False Claims Act); *United States* v. *Neifert-White Co.*, 390 U.S. 228, 233 (1968) (noting remedial nature of the civil False Claims Act); *Rainwater* v. *United States*, 356 U.S. 590,

[10] Of course, it is always open for an individual to try to show that the legislature did in fact intend to establish a criminal remedy while purporting to create only a civil one (*Kennedy* v. *Mendoza-Martinez*, 372 U.S. 144, 168-169 (1963)), but amicus has made no real effort to show that the civil False Claims Act falls into that category. Amicus notes (Br. 24-25) that the double damages and $2000 payment provisions were part of a bill designed to "punish" frauds, but the legislative history makes clear that those remedies were not regarded as criminal. Indeed, the original bill debated in the Senate was criticized precisely because it lacked provision for criminal "punish[ment] by fine and imprisonment" and was therefore insufficiently severe. Cong. Globe, 37th Cong., 3d Sess. 954-955 (1863). The bill then passed the Senate without criminal penalties (*id.* at 958), but the House added them as an additional remedy (*id.* at 1307), and the Senate concurred in the amendment without debate (*id.* at 1322-1323).

592 & n.8 (1958) (noting the creation of separate civil and criminal sanctions in the original False Claims Act); *Hess*, 317 U.S. at 551-552 (noting purpose of providing restitution in the civil False Claims Act).[11] Amicus's objection to the remedy in this case flows only from the fact that appellee defrauded the government 65 separate times and is liable for a civil penalty for each such fraud under the

[11] Amicus insists (Br. 25-26) that the designation of the remedies under 31 U.S.C. 3729 as "civil penalt[ies]" is of little significance, since that term appeared in the 1982 revisions that were not intended to make substantive changes. However, it is more sensible to read the "civil" designation as reflecting an understanding that those remedies were always civil in nature, and history buttresses that understanding. In the original version of the False Claims Act, Congress expressly provided both for double damages and a $2000 payment and, "*in addition thereto*," criminal penalties (Act of Mar. 2, 1863, ch. 67, § 3, 12 Stat. 698 (emphasis added)). Moreover, the remedy Congress provided is a civil money judgment enforceable just as any other civil judgment would be. The Court underscored that fact in *Hess*, stating (317 U.S. at 551), that although the word "forfeit" in the original Act might "under other circumstances be an appropriate word to suggest a fine upon the failure to pay which an individual might be imprisoned, no such punishment is provided here upon default in payment." The text of the Act was therefore "wholly consistent with a civil action for damages" (*ibid.*).

False Claims Act, not because he is being subjected to an action "intended to authorize criminal punishment to vindicate public justice" (317 U.S. at 548-549). That latter factor, however, is necessary to invoke the protections of the Double Jeopardy Clause.[12]

Amicus's position is especially odd because it posits a limitation on the power of Congress to prescribe remedies, yet that limitation comes into effect only when the proceeding in which the "excessive" remedy is sought follows an earlier, criminal proceeding.[13] Thus, although amicus

[12] In the civil False Claims Act, Congress chose a reasonable fixed sum of $2000 as a civil sanction ($5000 to $10,000 under the current version of the Act) to compensate the government for each false claim made and to deter such fraud in the first place. That measure of recovery cannot be deemed to be "unreasonable or excessive" (*Rex Trailer*, 350 U.S. at 154) in this case unless Congress must – as a matter of constitutional imperative – anticipate that there are "economies of scale" involved in investigating and recovering damages for many small frauds and must provide a measure of recovery specially devised for that situation in order to avoid having its civil statutes become criminal in a given setting. Considering the vast range of government business and the diversity of contractors that the False Claims Act covers, Congress can hardly be deemed to have inadvertently crossed the threshold from a civil to a criminal sanction by adopting a standard measure of recovery to ensure full compensation to the government and to discourage wrongdoers who might otherwise hope that their frauds are too small to justify the time and effort of a civil action.

[13] Amicus's suggestion (Br. 32) that this Court might somehow view the False Claims Act $2000-per-claim payment provision as discretionary is completely unfounded. The original language of the act provided that a person "who shall do or commit any of the [prohibited acts] * * * *shall* forfeit and pay to the United States the sum of two thousand dollars" (see note 5, *supra* (emphasis added)). That the provision is mandatory is confirmed by ample authority, cited in our opening brief (at 17 n.12). The district court was therefore correct in holding in its second opinion that it was compelled to award a separate $2000 payment for each of the false claims made by appellee.

poses hypothetical examples of extremely large penalties for extremely small losses in an effort to paint the government's position as unreasonable (Br. 27-28), amicus would have to concede that every one of the hypothetical penalties he identifies is one that Congress could impose and the Executive Branch could obtain so long as the government forbears from first bringing a criminal prosecution. Indeed, amicus's concessions appear to go further and suggest that the government can, without any double jeopardy problem, obtain in a single proceeding whatever penalties Congress intends, no matter how large (see 7-8, *supra*).[14] What is at stake between amicus's position and ours, therefore, is not the protection of defendants in civil cases from excessive penalties, but a restructuring of the way in which the government can obtain those penalties. There is no sound basis to invoke the Double Jeopardy Clause to compel such a drastic restructuring of the relationship between criminal and civil proceedings.

For the foregoing reasons and the reasons stated in our opening brief, the judgment of the district court should be reversed.

Respectfully submitted.

CHARLES FRIED
Solicitor General

DECEMBER 1988

[14] Depending on how this Court decides *Browning-Ferris Industries* v. *Kelco Disposal, Inc.*, cert. granted, No. 88-556 (Dec. 5, 1988), it is conceivable that some of amicus's hypothetical examples might raise Eighth Amendment issues, but for present purposes it suffices to note that amicus's position in *this* case would do nothing to aid defendants faced with the large penalties that amicus hypothesizes, unless they had been previously convicted.

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